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# In the Supreme Court of the United States

FAIRFAX REALTY, INC., NORTH PLAINS LAND COMPANY, LTD., AND NORTH PLAINS DEVELOPMENT COMPANY, LTD.,

*Petitioners,*

v.

ARMAND L. SMITH AND VIRGINIA L. SMITH,

*Respondents.*

**On Petition for a Writ of Certiorari to the Utah Supreme Court**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

The plaintiffs in this case alleged that the transfer of partnership property to a real estate investment trust ("REIT") constituted breach of contract, breach of fiduciary duty, and conversion. The jury awarded $1.1 million in compensatory damages and $5.5 million in punitive damages, to which the trial court added almost $525,000 in attorneys' fees and costs. Though reducing the compensatory award by nearly $100,000, the Utah Supreme Court affirmed the punitive award over petitioners' excessiveness challenge. Invoking findings by the trial court about aggravating factors that the jury "could have found," the Utah Supreme Court held that petitioners' "actions * * * support a substantial award of punitive damages." It then proceeded to hold that the approximately 5.5:1 ratio of punitive to compensatory damages fell "well within the single-digit ratio discussed by" this Court in *State Farm Mutual Automobile Insurance Co.* v. *Campbell*, 123 S. Ct. 1513 (2003).

The general question presented is whether the punitive award is unconstitutionally excessive. More specifically, this petition presents the following two questions that recur in punitive damages litigation:

1. Whether punitive awards that are less than ten times compensatory damages are presumptively constitutional, notwithstanding this Court's statement in *State Farm* that, "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to the compensatory damages, can reach the outermost limit of the due process guarantee."

2. Whether, in the context of determining the degree of reprehensibility of a defendant's conduct, the practice of giving the plaintiff the benefit of all conceivable inferences from the evidence is consistent with the "[e]xacting appellate review" of punitive damages awards that this Court held to be constitutionally required in *State Farm* and *Cooper Industries, Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001).

## RULES 29.6 AND/OR 14.1 STATEMENT

Petitioner Fairfax Realty, Inc. is a privately owned company that owns approximately 16% of petitioner North Plains Land Company, Ltd and 16% of petitioner North Plains Development Company, Ltd. NP Investment Company, a partnership consisting of former officers of JP Realty, Inc., owns 10% of North Plains Development Company, Ltd. All other ownership interests are private entities.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioners Fairfax Realty, Inc. (formerly Price Development Company),[1] North Plains Land Company, Ltd., and North Plains Development Company, Ltd. (collectively "Fairfax") respectfully petition for a writ of certiorari to review the judgment of the Utah Supreme Court in this case.

## OPINIONS BELOW

The opinion of the Utah Supreme Court (App., *infra*, 1a-25a) has not yet been published in the official reports but may be found at 2003 WL 22272111. The judgment of the trial court entering the special verdicts of the jury for compensatory and punitive damages and its special findings with regard to the punitive award (App., *infra*, 26a-38a) are unreported.

## JURISDICTION

The Utah Supreme Court issued its opinion and judgment affirming in part and reversing in part the trial court's judgments on October 3, 2003. A timely petition for rehearing was denied on October 29, 2003. This Court possesses jurisdiction to review the decision of the Utah Supreme Court under 28 U.S.C. § 1257(a).

The Utah Supreme Court's conclusion that petitioners "failed to adequately brief the excessiveness issue as a federal constitutional challenge" and its citation of Utah cases for the proposition that it "is not obligated to address issues that are not adequately briefed" (App., *infra*, 15a & n.12) do not deprive this Court of jurisdiction to consider petitioners' contention that the size of the punitive award violated the federal due process

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[1] Price Development Company changed its name in January 1994 to Fairfax Realty. Tr. 1124. To avoid confusion with the entity created to hold the properties contributed to the REIT, which was also named Price Development Company, the original Price Development Company will be referred to as Fairfax throughout this petition.

clause. As this Court has explained, proper preservation of a federal constitutional claim "does not demand the incantation of particular words; rather it requires that the lower court be fairly put on notice as to the substance of the issue." *Nelson* v. *Adams USA, Inc.*, 529 U.S. 460, 469 (2000). Accordingly, if "the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented." *New York ex rel. Bryant* v. *Zimmerman*, 278 U.S. 63, 67 (1928).

In this case, there can be no doubt that petitioners "fairly put [the Utah Supreme Court] on notice" that their excessiveness claim was based on the due process clause as well as state law, asserting in their opening brief:

> The same conclusion is directed by federal law. Under the three guideposts for federal due process analysis – "'[1] the degree of reprehensibility of the [conduct]; [2] the disparity between the harm suffered . . . and [the] punitive damage award]; and [3] the difference between this remedy [the punitive damage award] and the . . . penalties authorized or imposed in comparable cases,'" *Campbell*, 2001 UT 89, ¶39 (citing *BMW* [*of N. Am., Inc.* v. *Gore*], 517 U.S. [559,] 574-75 (1996) – the award here is excessive and requires reversal or significant reduction.

App., *infra*, 41a (alterations in original except in case citation). See also Brief of Appellants at 38-39, *Smith* v. *Fairfax Realty, Inc.*, No. 20010673-SC, 2003 WL 22272111 (Utah Oct. 3, 2003) (citing Utah Supreme Court's observation in *Campbell* that the second factor under Utah law "'mirrors'" the reprehensibility guidepost described in *BMW*).[2]

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[2] Though finding that petitioners did not adequately brief the federal constitutional issue, the Utah Supreme Court nevertheless observed that there is a substantial overlap between the state-law factors and the *BMW* guideposts (App., *infra*, 15a) — precisely petitioners' reason for not separately briefing the point — and proceeded to liberally cite *BMW*, *State Farm*, and other federal excessiveness

This kind of specific reference to the due process clause and citation of due process case law is more than sufficient to preserve the federal issue under this Court's precedents. See, *e.g.*, *Taylor* v. *Illinois*, 484 U.S. 400, 406-07 n.9 (1988) (petitioner's Sixth Amendment compulsory process claim was properly presented to state court even though it asserted only a due process violation where petitioner cited and relied upon two of Court's Compulsory Process Clause cases); *Eddings* v. *Oklahoma*, 455 U.S. 104, 113-14 n.9 (1982) (although petitioner failed to present precise cruel and unusual punishment argument to state courts or to cite leading Court precedent supporting argument, the argument was adequately presented by the general argument that death penalty was excessive punishment, because Court's "jurisdiction does not depend on citation to book and verse").

## CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part that "[n]o State shall * * * deprive any person of life, liberty, or property, without due process of law."

## STATEMENT

The Utah Supreme Court's decision affirming the $5.5 million punitive award against petitioners is the product of two fundamental misapplications of this Court's punitive damages precedents that, regrettably, are not unique to this case.

First, the Utah Supreme Court construed this Court's statement in *State Farm* that, "in practice, few [punitive] awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process" (123 S. Ct. at 1524) to mean that ratios "within the single-digit ratio discussed by [this Court]" in *State Farm*

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precedents in its analysis (*id.* at 18a-19a, 21a-22a, 23a-24a).

present no constitutional concerns. App., *infra*, 24a. That interpretation is squarely precluded by this Court's further statement that "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee" (123 S. Ct. at 1524), yet the Utah Supreme Court is far from the only court to focus exclusively on whether the punitive/compensatory ratio is within single digits. Indeed, of the 23 reported post-*State Farm* cases in which compensatory damages (or potential harm) have exceeded two hundred thousand dollars, in ***only one*** did the reviewing court hold that *State Farm* necessitated remittitur to a 1:1 ratio. Review is therefore warranted to make clear to the lower courts that single-digit ratios of punitive to compensatory damages are not immune from constitutional scrutiny and, indeed, that, when compensatory damages are substantial, a powerful justification is needed to sustain a ratio in excess of 1:1.

Second, in concluding that petitioners' "actions amount to affirmative misconduct showing deliberate misrepresentation and disregard of the rights of the [respondents]" and hence "support a substantial award of punitive damages" (App., *infra*, 19a-20a), the Utah Supreme Court relied on the trial court's conclusion that "the jury ***could have found*** by clear and convincing evidence a pattern of deceit, failure to disclose and misrepresentation" (*id.* at 35a (emphasis added)). But there were no actual jury findings beyond the ones necessary to establish the elements of the torts for which petitioners were found liable. In essence, the trial court applied the standard of review used to test the sufficiency of evidence for a liability finding — taking all evidence in the light most favorable to the verdict and giving the plaintiff the benefit of all conceivable inferences from the evidence — and the Utah Supreme Court then used the trial court's conclusions in determining that petitioners' conduct was sufficiently reprehensible to warrant a $5.5 million punishment. This doubly deferential approach cannot be squared with the "[e]xacting appellate review"

required by this Court in *State Farm,* 123 S. Ct. at 1520, and *Cooper Industries*. The *de novo* review of the three *BMW* guideposts required by those cases precludes treating the ***degree*** of reprehensibility as the kind of factual finding as to which "sufficiency-of-the-evidence" review suffices. Instead, because, in the absence of jury interrogatories, there is no way to know how reprehensible the jury deemed the conduct to be, courts may defer only to "specific findings of fact" by the jury (*Cooper Indus.*, 532 U.S. at 439 n.12). Nevertheless, most courts continue to deprive defendants of the due process to which they are entitled by deferring to phantom factual findings when determining the degree of reprehensibility of the conduct. Review is warranted to correct this prevalent problem in the administration of punitive damages.

The relevant facts are as follows:

1. *The partnerships and the North Plains Mall.* In the early 1980s, Fairfax purchased a 33-acre parcel in Clovis, New Mexico, from Armand Smith and others,[3] in exchange for $2 million and a 15% interest in two limited partnerships — North Plains Development Company, Ltd. and North Plains Land Company, Ltd. ("the Partnerships"), whose purpose was to construct and develop a shopping center (the "Mall") on the purchased land. P. Exhs. 15, 16; Tr. 403-04, 1809-10. The Mall was constructed with a $9 million interim loan from Wells Fargo Realty Advisors, which the Partnerships subsequently paid off using the proceeds of a $12 million short-term loan from Chemical Bank in October 1989. Tr. 1058-59, 1812. During the period after 1985, the Mall operated at a deficit. Tr. 1058.

In December 1989, a "capital call" was made on the partners, requesting contributions in accordance with their

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[3] Armand Smith and his ex-wife Virginia will be collectively referred to as "the Smiths." References to "Smith" are to Armand Smith alone.

ownership interests, in order to cover the shortfall between the cost of additional construction on the Mall and financing for the project raised by the Partnerships. The capital call resulted in a contribution of approximately $228,000 from the Smiths and $1,294,210 from Fairfax. Tr. 239-40. Smith also contributed water rights worth $30,000 to the Partnerships for use by the Mall's tenants. Tr. 248-49. To cover the Mall's operating deficits, Fairfax obtained "gap loans" of $1.5 million from its own bank line and advanced those funds as a loan to the Partnerships. Tr. 1060, 1115-16, 1911-12.

2. *Attempts to refinance the Chemical Bank loan.* The Chemical Bank short-term loan had a maturity date of October 1991. For several years prior to that date, Fairfax attempted to obtain a long-term loan or other financing arrangement through a national broker. Tr. 1061-62, 1898-99, 1929. As the maturity date approached, Fairfax engaged another national broker to seek other financing arrangements or, alternatively, a sale of the Mall to pay off the Chemical Bank loan. Tr. 422-23, 1243, 1599-1600, 1613-15, 1914, 1932-33. As of 1991, Chemical Bank had a "growing concern" that the loan "was not going to be repaid any time soon" due to the unfavorable location of the Mall and adverse market conditions. Tr. 1649.

Fairfax successfully sought five short-term extensions of the Chemical Bank loan from 1991 to July 1993 to allow it to seek other financing or a buyer. Tr. 1065-66. Due to the amount of the loan, however, the Mall was considered a "seriously distressed" property. Tr. 1719, 1784-85. Substantial efforts to finance or sell the Mall throughout 1992 proved to be unsuccessful, due in large part to the collapse of the national permanent financing and real estate markets. Tr. 1063, 1066-67, 1076, 1600-03. Only one institutional lender, Allstate Insurance Company, actively considered refinancing, and at an amount of only $9 million; this figure subsequently dropped to $6 million — about half the sum needed. Tr. 1604. Fairfax was told by its second broker in December 1992 that he had "exhausted all the avenues and there was basically no one

interested in buying the property or in arranging a financing." Tr. 1604.

Upon expiration of the fifth extension in July 1993, Chemical Bank served a notice of default and demanded payment in full of the $11.3 million outstanding loan balance. Tr. 1106-07. In its search for financing alternatives, Fairfax was alerted by several investment banks to the possibility of the REIT structure — which had risen in nationwide popularity due to the collapse of the financing market for real estate — as a potential financing vehicle. Tr. 1082-83, 1098. Accordingly, in September 1993, Fairfax negotiated a sixth extension, through January 15, 1994 with the option of an additional six-month extension through July 15, 1994, on the basis that it was working to organize a REIT to pay off the loan. Tr. 1175-76, 1235. Significantly, Chemical Bank would not have granted the extension but for the prospect of having the loan paid off, and informed Fairfax that it would grant no further extensions. Tr. 1069-70, 1073, 1075. Under these circumstances, Fairfax believed that the only viable course of action to enable it to pay off the loan, preserve value for the partners, and avoid the adverse tax consequences of foreclosure was to transfer the Mall to a REIT. Tr. 1087-88, 1089, 1097, 1129, 1235, 1922-23.

3. *The REIT transaction.* In a July 19, 1993 telephone conversation, Fairfax representatives Paul Mendenhall and Rex Frazier discussed with Smith their efforts to secure additional financing to replace the Chemical Bank loan and the possibility of creating a REIT by pooling several of Fairfax's shopping malls and other commercial properties that would include the Mall. Tr. 263-71, 475-76, 486, 487, 1077-80, 1083-84. In response, Smith expressed concern about what would happen to his interest in the event of such a transaction. Tr. 265. According to Smith, he was told that he would have three options: (1) his interest would be bought out; (2) Fairfax's 85% interest would be contributed to the REIT, making Smith a partner with the REIT; and (3) the entire property would be

contributed to the REIT and he would receive stock in the REIT. Tr. 270-71.

In early September 1993, Fairfax formed JP Realty, Inc., a Maryland corporation, which would be the "trust" entity, and Price Development Company, a Maryland limited partnership, of which JP Realty was the general partner, which would hold the properties. Tr. 496-98. That same month, a registration statement of JP Realty was filed with the Securities and Exchange Commission ("SEC") (Tr. 498), and Fairfax signed two contribution agreements by which the Mall would be transferred to the REIT in exchange for partnership units in Price Development Company at the time of, and conditioned upon, the REIT's closing (P. Exhs. 58, 59; Tr. 284-85, 1092-93, 2020). Fairfax did not talk to Smith with regard to the transfer of the property into the REIT at this time and did not disclose the contribution agreements to the Smiths until April 1994. Tr. 285-86, 513, 360-61, 1994. The registration of the REIT with the SEC also was not disclosed to the Smiths. Tr. 502, 506. It is undisputed, however, that Fairfax relied upon the advice of counsel that the securities laws precluded it from making an earlier disclosure to the Smiths because Mrs. Smith was an "unaccredited investor." Tr. 507, 521, 1103-04, 1233, 1920, 1994-97.

On January 13, 1994, Fairfax sent Smith the final Prospectus for the REIT (Tr. 298), which disclosed that the Mall was to be contributed to the REIT, described the formation of the REIT, and disclosed Fairfax's potential conflicts of interests in and benefits from the REIT (P. Exh. 71; Tr. 1942-59). Although there was testimony that the REIT transaction benefitted both Fairfax and John Price (Fairfax's chairman and CEO) personally (Tr. 899-907), it is undisputed that Fairfax could have gone ahead with the REIT without the Mall (Tr. 1122-23, 1921-22) and that John Price would have received all the benefits of the REIT if the Mall had not been contributed to the REIT (Tr. 1123, 1326-27). Moreover, despite Price's alleged disincentive to sell the Mall due to

adverse tax consequences from a sale (Tr. 1571, 1578, 1988-89), the undisputed testimony was that such consequences were not a consideration during the refinancing process (Tr. 1989), and, in fact, likely would not have even been triggered by a sale (Tr. 2021).

On January 20, 1994, the day before the REIT closed, Fairfax informed Smith that he would receive 13,319 units from the REIT, which at the Prospectus price of $17.50 per unit represented a value of $233,882.50. Tr. 1843, 1998. The value of the REIT was established by underwriters, who determined through due diligence what the public was willing to pay. Tr. 1099, 1249. Fairfax did not seek appraisals of the Mall's fair market value before its contribution to the REIT, based on advice from investment bankers that such appraisals were not necessary. Tr. 1128, 1150. Fairfax also did not seek the Smiths' consent prior to closing the REIT, based on advice of counsel that federal securities laws prevented disclosure of the relevant information to the Smiths and that consent was not required by the partnership agreements. Tr. 502, 1092-94, 1105, 1137-40, 1997.

The REIT went public on January 21, 1994, selling approximately $198 million in stock. In all, 38 properties, including the Mall, were contributed to the REIT in exchange for shares in the REIT. Tr. 1164, 1226-27, 1232. John Price diluted his personal interest by several million dollars to enable the transaction go forward. Tr. 1112. On or before the closing, the schedules to the Contribution Agreement were amended to reflect that the Partnerships had been allocated 20,793 REIT shares: 8,793 shares were allocated to the Partnerships by the underwriters using the standard REIT formula, and 12,000 were personally contributed by John Price to resolve Smith's concern that the REIT value did not reflect the fair market value of his interest in the Mall and to compensate him for his capital contribution of roughly $228,000. P. Exh. 58, Exh. B; Tr. 288-89, 1998-2002. Although this calculation "should have been attached to the contribution agreements" sent to Smith in April

1994 (Tr. 2011), Smith claimed that he did not see the revised accounting until 2000 (Tr. 1868-71).

It is undisputed that the Mall was valued according to traditional REIT standards (Tr. 1294-95), and that the Smiths were treated the same as all other partners in the REIT (Tr. 1114, 1232, 1984), except that the Mall's capitalization rate was decreased, thereby increasing the Mall's value and avoiding a major tax liability (Tr. 1111-12, 1166-67, 1288-90). As a result of the sale of shares in the REIT, the Chemical Bank loan was paid off, thereby eliminating Smith's guarantees on the loan (Tr. 938, 1121, 1948-49), and a portion of the new debt was allocated to the Partnerships to preserve or confer tax advantages, the benefits of which were allocated to the Smiths rather than to other partners in the Partnerships (Tr. 978, 1121-22, 1289-90, 1937).

To assuage Smith's continuing objections to the REIT valuation, on March 8, 1994, Fairfax sent a letter to Smith setting forth an "original computation" and a "revised computation" of the Smiths' interest in the REIT value of the Mall. App., *infra*, 42a-44a. Under the original computation, the Smiths were allocated 1,319 units, reflecting their 15% share of the January 1994 computation of 8,793 units, plus 13,179 additional units from John Price for their capital call, for a total of 14,498 units. *Id.* at 42a. Under the revised computation, the Smiths received 352 units for their 15% interest in the allocation of 2,348 units to the Partnerships. *Id.* at 42a-43a. Fairfax proposed to pay the Smiths $230,640 for their capital contribution, plus 352 units (worth an additional $6,160) established by the revised computation. *Id.* at 43a. The total value of this offer was almost five times higher than the value of the 15% interest in 20,793 units allocated to the Partnerships that Smith claims was not disclosed to him until 2000, which was worth $54,582.50 (3,119 units times $17.50 per unit).

4. *Proceedings below.* The Smiths retained counsel in June 1994 to bring suit (Tr. 364), and the case proceeded to trial in March 2001 on claims for breach of fiduciary duty, breach of contract, and conversion. At trial, the Smiths' appraisal expert John Howden testified that the fair market value of the Mall as of January 1, 1994, was $16 million and that the Mall could have sold for that sum to a willing buyer had it been left on the market for one year (Tr. 626, 673) — a period of time not available to Fairfax under the conditions of the sixth extension. Howden acknowledged, moreover, that when making his appraisal he was unaware that Fairfax had been attempting to locate a buyer for the Mall without success, and did not consider whether the Mall would be able to obtain long-term financing. Tr. 670-71, 673, 674.

Relying on Howden's appraisal, the Smiths' damages expert Merrill Norman testified that, if the Mall had been sold at fair market value, the Smiths would have received repayment of their capital call ($228,390) with interest, repayment of their capital contribution of water rights ($30,000), and 15% of the remaining proceeds as repayment of the balance of their capital ownership interest ($149,004), resulting in a total of $407,394. Tr. 805-12, 860-66. Norman then calculated compound prejudgment interest as follows: $443,023 of interest on the $228,390 capital contribution since 1990, and $154,198 in prejudgment interest on the value of the Smiths' 15% remaining equity interest, for a total prejudgment interest claim of $597,221. App., *infra*, 45a-47a. Norman admitted that he did not know whether the Mall would have been lost to foreclosure had it not been contributed to the REIT, whether Chemical Bank would have refused to grant additional extensions of the loan, or whether the Partnerships could have obtained money to pay off the Chemical Bank loan had it gone into default. Tr. 917, 943, 945.

In the first phase of the trial, the jury returned a special verdict finding that Fairfax had breached the partnership agreements, breached its fiduciary duty to the Smiths, and

converted property belonging to the Smiths. App., *infra*, 27a-28a. The jury awarded the Smiths damages of $410,000 for these claims and prejudgment interest of $690,000, which was $92,000 more than the amount of prejudgment interest calculated by Norman. *Id.* at 28a. In the second phase of the trial, the jury imposed punitive damages of $5.5 million. *Id.* at 29a. The trial court entered judgment on this verdict and awarded the Smiths attorneys' fees and costs in the amount of almost $525,000. *Id.* at 30a-33a.

The trial court denied Fairfax's post-trial motions and entered "special findings of fact" with regard to the punitive award as required by state law. In its special findings, the court determined that "[t]he jury could have found by clear and convincing evidence a pattern of deceit, failure to disclose and misrepresentation with respect to the three 'options' which [Fairfax] personnel discussed with Armand Smith relative to formation by [Fairfax] of a real estate investment trust." App., *infra*, 35a. In support of this conclusion, the court stated that there was "substantial evidence" that:

- Fairfax delayed disclosing to the Smiths the contribution agreements conveying the Mall to the Price Development Company for the benefit of the JP Realty REIT and the resulting unavailability of the three options that Fairfax originally gave them regarding how their interests would be handled in a REIT transaction until several months after the fact;
- Fairfax's March 1994 "revised calculation" of the Smiths' interest in the REIT value of the mall was "intentionally misleading";
- Fairfax failed to provide an accurate accounting of that interest until 2000, after nearly six years of litigation; and
- Fairfax paid excessive fees to itself as general partner, commingled funds from different properties, and accrued

interest to itself on its own capital contributions, while denying the Smiths similar treatment.

*Id.* at 35a-37a. The court concluded that the punitive award "was within the zone of reasonableness given the conduct of [Fairfax] and the circumstances of the case and clearly was not excessive or disproportionate as to suggest or evidence passion or prejudice of the jury." *Id.* at 38a.

The Utah Supreme Court affirmed in part, remitted in part, and remanded. The court began its opinion by reciting the facts in the light most favorable to the plaintiffs. App., *infra*, 2a-5a. After determining first that prejudgment interest is an available remedy under Utah law and then ordering a remittitur of the jury's $690,000 award of prejudgment interest to $597,221, the figure calculated by Norman (*id.* at 7a-13a), the court turned to the punitive damages. "[R]eview[ing] the record in the light most favorable to the Smiths," the court found "more than sufficient evidence to support the [trial] court's submission of the punitive damages question to the jury." *Id.* at 14a. Though purporting to review petitioners' challenge to the amount of the punitive award *de novo* (*id.* at 16a), the Utah Supreme Court proceeded to defer to the trial court's finding that the jury "'could have found'" that Fairfax engaged in "'a pattern of deceit, failure to disclose and misrepresentation,'" which, it concluded, "support[s] a substantial award of punitive damages." *Id.* at 19a-20a. It then observed that the approximately 5.5:1 ratio between the punitive award and the reduced compensatory award was "well within the single-digit ratio discussed in" *State Farm*. *Id.* at 24a. It accordingly upheld the $5.5 million dollar punishment in its entirety.

## REASONS FOR GRANTING THE PETITION

### A. Review Is Necessary To Supply Lower Courts With Further Guidance Regarding The Ratio Guidepost.

In *State Farm*, this Court recognized the need to give lower courts additional guidance as to the proper application of the

ratio guidepost. Departing from its past practice of saying little more than that "a general concern of reasonableness . . . properly enters into the constitutional calculus" (*BMW*, 517 U.S. at 583 (internal quotation marks, alterations, and citations omitted)), the Court provided the broad contours of a framework for determining the constitutionally permissible range of ratios in a particular case.

To begin with, the Court explained, "[o]ur jurisprudence and the principles it has now established demonstrate * * * that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." 123 S. Ct. at 1524. The Court went on to remind lower courts that in *Pacific Mutual Life Insurance Co.* v. *Haslip*, 499 U.S. 1 (1991), it had indicated that a punitive award of four times compensatory damages "might be close to the line of constitutional impropriety" and that in *BMW* it "cited that 4-to-1 ratio again" and "further referenced a long legislative history, dating back over 700 years and going forward to today, providing for sanctions of double, treble, or quadruple damages to deter and punish." *Ibid.*[4] The Court reiterated its observation in *BMW* that "ratios greater than those we have previously upheld may comport with due process where a particularly egregious act has resulted in only a small amount of economic damages." *Ibid.* (internal quotation marks omitted). But it then went on to add that "[t]he converse is also true * * *. When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limits of the due process guarantee." *Ibid.*

Applying these guidelines to the facts of the case before it, the Court observed that the $1 million compensatory award for emotional distress sustained by the plaintiffs for the year and a

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[4] We note in passing that, although double, treble, and quadruple damages correspond to punitive/compensatory ratios of 1:1, 2:1, and 3:1, most lower courts mistakenly have equated them with ratios of 2:1 to 4:1.

half that State Farm left them subject to an "excess verdict" was "substantial" and constituted "complete compensation." *Ibid.* The Court further noted that those damages embodied a punitive component. *Id.* at 1526. For these reasons, it concluded that, even though the defendant's conduct was "reprehensible" and "merit[ed] no praise" (*id.* at 1521), "a punitive award at or near the amount of compensatory damages" — *i.e.*, a 1:1 ratio — was likely the constitutional maximum. *Id.* at 1526.

In the aftermath of *State Farm*, most lower courts have taken to heart the Court's admonition that, except when the compensatory damages are small and the conduct is egregious, double-digit ratios will rarely be constitutional. At the same time, however, many courts have assumed that single-digit ratios are immune from constitutional scrutiny, notwithstanding this Court's statement that the 700-year legislative history of 1:1 to 3:1 ratios is "instructive." Moreover, the Court's statement that, when compensatory damages are substantial, a 1:1 ratio may be the constitutional maximum, has been all but ignored.

The present case is illustrative. The Utah Supreme Court cited *State Farm*'s directives that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process" and that "[s]ingle-digit multipliers are more likely to comport with due process" before perfunctorily concluding that the 5.5:1 ratio before it was "well within the single-digit ratio discussed" by *State Farm*. App., *infra*, 23a-24a. The Utah Supreme Court paid lip service to *State Farm*'s observation that a 4:1 ratio "might be close to the line of constitutional impropriety" (*id.* at 23a), but without explanation failed even to reduce the punitive award to that limit. And despite the fact that the plaintiffs in this case sustained solely economic harm for which they received compensatory damages in excess of $1 million (plus another $525,000 in attorneys fees' and costs), the Utah Supreme Court omitted any mention of *State Farm*'s clearly

pertinent admonition that a 1:1 ratio may be the constitutional maximum when compensatory damages are substantial.[5]

Regrettably, the Utah Supreme Court is far from the only lower court that has treated this Court's pronouncements about the historical tradition of single, double, and treble damages as mere background and ignored entirely the Court's statement that a 1:1 ratio might be the constitutional maximum when the compensatory damages are substantial. For example, in one of the first post-*State Farm* decisions, the Eleventh Circuit acknowledged that $500,000 emotional distress awards to each of seven white librarians who allegedly were victimized by reverse discrimination were "substantial," but nonetheless upheld punitive awards against three individual defendants that were between four and five times the compensatory damages allocated to those defendants. *Bogle* v. *McClure*, 332 F.3d 1347, 1362 (11th Cir. 2003), petition for cert. pending, No. 03-623. Without making any inquiry into the extent to which the compensatory awards adequately satisfied the federal interests in deterrence and punishment or explaining why the

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[5] The $1 million compensatory award was "substantial" by any objective measure and indisputably constituted complete compensation for respondents' economic injuries, as it included their 15% interest in the partnerships, their capital contributions, and interest accruing from the time the Mall was transferred to the REIT in January 1994 to the time of trial in March 2001. App., *infra*, 45a-47a (Norman calculation of damages). In fact, because prejudgment interest is limited under Utah law to cases in which damages are complete and readily ascertainable (*id.* at 11a), it is properly considered to be extra-compensatory and to contain a punitive element, much like the compensatory award for emotional distress in *State Farm*. Moreover, not only did the award of attorneys' fees make respondents whole, it too served deterrent and punitive functions. See *Smith* v. *Wade*, 461 U.S. 30, 94 (1983) (O'Connor, J., dissenting) ("awards of compensatory damages and attorney's fees already provide significant deterrence"). Under these circumstances, the only justifiable punitive award was one "at or near the amount of compensatory damages." *State Farm*, 123 S. Ct. at 1526.

defendant's conduct was materially more reprehensible than the conduct at issue in *State Farm*, the Eleventh Circuit stated that the approximately 4:1 aggregate ratio was within "a range which the Supreme Court has found to be 'instructive,'" and therefore held that the ratio "does not indicate that the punitive damages award violates due process." *Ibid.*

Similarly, in a case alleging employment discrimination on the basis of ethnicity and national origin, the Ninth Circuit upheld a $2.6 million punitive award that was over seven times the $360,000 compensatory award for economic loss and emotional distress. *Zhang* v. *Am. Gem Seafoods, Inc.*, 339 F.3d 1020 (9th Cir. 2003), petition for cert. pending, No. 03-944. Focusing solely on the Court's observation that single-digit multiples are more likely to pass constitutional muster than higher ratios, the Ninth Circuit concluded that the 7.2:1 ratio before it "is not constitutionally excessive." *Id.* at 1044. Essentially reading the Court's statement that the long history of double, treble, and quadruple damages remedies is "instructive" and its admonition that a 1:1 ratio may be the constitutional maximum when compensatory damages are substantial out of the opinion, it explained:

> This is of course a single-digit ratio, far below the ratios at issue in *BMW*, *Cooper Industries*, and *State Farm*. We are aware of no Supreme Court or Ninth Circuit case disapproving of a single-digit ratio between punitive and compensatory damages, and we decline to extend the law in this case.

*Ibid.*

And in a case that this Court vacated and remanded for further consideration in light of *State Farm*, the Federal Circuit held that *State Farm* did not require it to reduce a $50 million punitive award that was more than three times the compensatory damages the court regarded to have arisen out of the business tort committed by the defendant. *Rhone-Poulenc Agro, S.A.* v. *DeKalb Genetics Corp.*, 345 F.3d 1366 (Fed. Cir.

2003). The Federal Circuit's explanation well demonstrates why this Court's further guidance on ratios is so necessary. Focusing entirely on this Court's statements that few ratios exceeding single digits will pass constitutional muster and that a ratio of more than 4:1 may be close to the line — and ignoring entirely the Court's reference to the long history of double, treble, and quadruple damages remedies and its observation that a 1:1 ratio may be the constitutional maximum when compensatory damages are substantial (as they undeniably were in the case before it) — the Federal Circuit stated:

> In this case, the proportion of punitive damages to compensatory damages does not even approach the possible threshold of constitutional impropriety. The $50 million punitive award is barely above three times the compensatory award of $15 million in this case. That ratio remains within the "[s]ingle-digit multipliers [which] are more likely to comport with due process," not even reaching the 4-to-1 ratio mentioned by the Court as a threshold where the punitive award may become suspect.

*Id.* at 1371-72 (alterations in original; citation omitted).

Indeed, of the 23 post-*State Farm* cases (in addition to this one) in which compensatory awards (or potential harm) have exceeded $200,000, in ***only one*** case has a reviewing court construed *State Farm*'s ratio analysis to necessitate a reduction to roughly a 1:1 ratio.[6] See *TVT Records* v. *Island Def Jam Music Group*, 279 F. Supp. 2d 413 (S.D.N.Y. 2003). In that case, the trial court observed that "the Supreme Court's instructions on [the ratio] point still appear somewhat imprecise" and characterized the guidance given by the Court on ratios as "still formative." *Id.* at 449-50. Nevertheless, unlike the Utah Supreme Court, the *TVT* court found "[m]ost

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[6] Our survey is limited to decisions that are accessible through electronic databases.

compelling" this Court's "instructions concerning the relative size of the compensatory damages verdict." *Id.* at 450. Concluding that the nearly $24 million in compensatory damages was both "substantial" and "complete compensation" for the plaintiff's injury, the district court held that "any punitive recovery beyond [the amount of the compensatory damages] would be more than necessary to achieve the level of retribution and deterrence appropriate to this case * * *." *Id.* at 450-51.

Aside from *TVT*, no other court confronted with a compensatory award of $200,000 or higher has ordered a remittitur to 1:1 or below, and most courts have treated either 9:1 or 4:1 as a constitutional free pass. See, *e.g.*, *Greenberg* v. *Paul Revere Life Ins. Co.*, 2004 WL 74630, at *2 (9th Cir. Jan. 12, 2004) (concluding that "[t]he 4.4:1 ratio between the compensatory and punitive awards in this case is similar to the 4:1 ratio in *BMW* and well within the 'single digit ratio' that marks the outer limits of permissible disparities" where compensatory damages were $547,445.42); *Advocat* v. *Sauer*, 111 S.W.3d 346, 361, 363 (Ark.) (focusing exclusively on Court's references to single-digit and 4:1 ratios, and holding that a 4.2:1 ratio was constitutionally "reasonable" where compensatory damages were $5 million), cert. denied, 124 S. Ct. 535 (2003); *Henley* v. *Philip Morris Inc.*, 2004 WL 79075, at *32 (Cal. Ct. App. Jan. 20, 2004) (stating that "where a plaintiff has been fully compensated with a substantial compensatory award, any ratio over 4 to 1 is 'close to the line'" and reducing ratio from 16.7:1 to 6:1 where compensatory damages were $1.5 million); *Diamond Woodworks, Inc.* v. *Argonaut Ins. Co.*, 135 Cal. Rptr. 2d 736, 762 (Cal. Ct. App. 2003) (concluding that *State Farm*, *BMW*, and *Haslip* suggest that in run-of-the-mill case the outer limit of constitutionally permissible punitive damages is four times compensatory damages, and reducing ratio from 21.3:1 to 3.9:1 where compensatory damages were $258,570); *Bocci* v. *Key Pharms., Inc.*, 76 P.3d 669, 674-76 (Or. Ct. App.) (focusing exclusively

on Court's references to single-digit and 4:1 ratios; stating that 4:1 "apparently is something of a benchmark for the United States Supreme Court," and reducing 45:1 ratio to 7:1 where compensatory damages were $500,000), modified on recons., 79 P.3d 908 (Or. Ct. App. 2003); *Reading Radio, Inc.* v. *Fink*, 833 A.2d 199, 215 n.3 (Pa. Super. 2003) (perfunctorily concluding that 2.7:1 ratio does not violate due process in light of *State Farm*'s statement on single-digit ratios, where compensatory damages were $300,000); *Haggar Clothing Co.* v. *Hernandez*, 2003 WL 21982181, at *7 (Tex. Ct. App. Aug. 1, 2003) (unpublished) (focusing exclusively on Court's reference to single-digit ratios in upholding 6.7:1 ratio where compensatory damages were $210,000), petition for review filed (Sept. 30, 2003); *McClain* v. *Metabolife Int'l, Inc.*, 259 F. Supp. 2d 1225, 1231 (N.D. Ala. 2003) (stating that "a multiplier of 9 or less means that the punitive damages presumptively passes [sic] muster under the Due Process Clause" and concluding that $1 million punitive award that was twice the plaintiff's compensatory damages "easily meets the ratio test").[7]

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[7] See also *Interclaim Holdings Ltd.* v. *Ness, Motley, Loadholt, Richardson & Poole*, 2004 WL 61114, at *18 (N.D. Ill. Jan. 8, 2004) (concluding that approximately 3.4:1 ratio was "well within the constitutional guidelines set forth by the Court" where compensatory damages were $8.3 million); *S. Union Co.* v. *S.W. Gas Corp.*, 281 F. Supp. 2d 1090, 1099-1105 (D. Ariz. 2003) (concluding that 154:1 ratio did not render punitive award unconstitutionally excessive in light of court's belief that $390,073 compensatory award understated damage done by defendant public official to the public trust); *Eden Elec., Ltd.* v. *Amana Co., L.P.*, 258 F. Supp. 2d 958, 972-75 (N.D. Iowa. 2003) (reducing 8.5:1 ratio to approximately 4.76:1 in business tort case in which plaintiff received "a substantial compensatory damages award" of $2.1 million); *Simon* v. *San Paolo U.S. Holding Co.*, 7 Cal. Rptr. 3d 367, 391 (Cal. Ct. App. 2003) (finding 4.3:1 ratio of punitive damages to $400,000 in potential harm not to be indicative of excessiveness because, "[e]ven if *State Farm* had imposed a 'bright-line' ratio, 4 to 1 would be 'close to the line of

Because "[t]he precise [punitive] award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff" (*State Farm*, 123 S. Ct. at 1524), it is not surprising that lower courts have reached different results in applying the ratio guidepost. But the near universal focus of the lower courts on the Court's references to single-digit and 4:1 ratios — and near universal disregard of its statement that a 1:1 ratio may be the constitutional maximum when compensatory damages are substantial — is much harder to comprehend. As the district court observed in *TVT*, the guidance provided in *State Farm* is "still formative." Further guidance is plainly needed both to

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constitutional impropriety,' but not presumptively unconstitutional"); *Romo* v. *Ford Motor Co.*, 6 Cal. Rptr. 3d 793, 812 (Cal. Ct. App. 2003) (deeming a 3:1 ratio of compensatory damages to be constitutionally permissible in products-liability case in which surviving family members received almost $4.6 million in compensatory damages); *Taylor Woodrow Homes, Inc.* v. *Acceptance Ins. Cos.*, 2003 WL 21224088, at *4 (Cal. Ct. App. May 28, 2003) (unpublished) (reducing 17.1:1 ratio to 3.4:1, where compensatory damages were $293,000, despite concluding that "[t]he facts here are not as bad as they were in *State Farm*"); *Borne* v. *Haverhill Golf & Country Club, Inc.*, 791 N.E.2d 903, 916 (Mass. Ct. App.) (invoking Court's statement that single-digit multipliers are more likely to comply with due process in upholding aggregate ratio of 3.4:1 where aggregate compensatory damages were $424,000), review denied, 795 N.E.2d 573 (Mass. 2003); *Gallegos* v. *Elite Model Mgmt. Corp.*, 2004 WL 51604, at *5 (N.Y. Sup. Ct. Jan. 6, 2004) (perfunctorily concluding that 2.4:1 ratio of punitive damages to $1.1 million award for pain and suffering "fully satisfied due process"); *Trinity Evangelical Lutheran Church & Sch.–Freistadt* v. *Tower Ins. Co.*, 661 N.W.2d 789, 803 (Wis. 2003) (implicitly concluding that 7:1 ratio of punitive damages to $490,000 in potential harm was not suggestive of an excessive punishment), cert. denied, No. 03-502 (Dec. 8, 2003); cf. *DiSorbo* v. *Hoy*, 343 F.3d 172, 188-89 (2d Cir. 2003) (ordering remittitur of $1.275 million punitive award to $75,000, where compensatory damages were $250,000, based on comparison with other police brutality verdicts).

clarify that, in admonishing that a 1:1 ratio may be the constitutional maximum when compensatory damages are substantial, the Court meant what it said, and to assist lower courts in identifying circumstances under which a departure from that benchmark is permissible.

### B. The Lower Courts Are Systematically Misapplying *BMW*'s Reprehensibility Guidepost By Deferring To Phantom Factual Findings Never Made By The Jury Rather Than Independently Gauging The Degree Of Reprehensibility Of The Defendant's Conduct.

The present case also is an ideal vehicle for addressing a second critical issue that has confounded the lower courts — how the requirement of *de novo* appellate review applies to the determination of the degree of reprehensibility of the defendant's conduct. This is a threshold question that arises in every case in which a reviewing court is tasked with evaluating an excessiveness challenge to a punitive award. And the answer to the question is very often determinative of the outcome of the reviewing court's excessiveness review. Accordingly, it is critical that the Court resolve the issue decisively once and for all.

1. In *Cooper Industries*, the Court held that appellate courts must conduct a *de novo* review of trial courts' application of the three *BMW* excessiveness guideposts (532 U.S. at 436), a mandate it recently reiterated in *State Farm* (123 S. Ct. at 1520). In so holding, the Court observed that "[e]xacting appellate review ensures that an award of punitive damages is based upon an application of law, rather than a decisionmaker's caprice." *Id.* at 1520-21 (internal quotation marks omitted). In neither *Cooper Industries* nor *State Farm*, however, did the Court instruct lower courts as to the meaning of "exacting" review in the context of determining whether the punishment is commensurate with the degree of reprehensibility of the conduct. A division in the lower courts has ensued.

The Ninth Circuit has stated that, although "[o]rdinarily appellate courts must defer to juries," "a hands-off appellate deference to juries, typical of other kinds of cases and issues, is unconstitutional for punitive awards." *In re Exxon Valdez*, 270 F.3d 1215, 1238-39 (9th Cir. 2001). On the other hand, most other reviewing courts have applied the standard of review used to test the sufficiency of evidence for a liability finding — taking the evidence in the light most favorable to the plaintiff, assuming the existence of any fact asserted by the plaintiff so long as the record contains "substantial evidence" to support it, and giving the plaintiff the benefit of all conceivable inferences supporting a finding of high reprehensibility — rather than independently gauging the degree of reprehensibility of the defendant's conduct.

The decision below is emblematic of this deferential approach. The Utah Supreme Court noted at the outset of its excessiveness review that it was applying a *de novo* standard of review. App., *infra*, 16a & n.13. Yet in analyzing the nature of Fairfax's misconduct — the state-law factor that "parallels" the reprehensibility guidepost (*id.* at 18a) — the court deferred to the trial court's "special findings stating that 'the jury ***could have found by clear and convincing evidence*** a pattern of deceit, failure to disclose and misrepresentation.'" *Id.* at 19a (emphasis added). Each of those special findings was premised solely on the existence of "substantial evidence" to support it (*id.* at 35a), not on an independent assessment of the evidence. Indeed, the Utah Supreme Court itself embraced the language of sufficiency-of-the-evidence review, stating that "***substantial evidence*** was presented at trial that [Fairfax] did not want the Smiths to interfere with the REIT's formation by filing an adverse claim or a lawsuit prior to January 1994 when the REIT went public." *Id.* at 20a (emphasis added).

The Utah Supreme Court's incorporation of a liability-type standard into the excessiveness analysis is far from unique. See, *e.g.*, *Bogle*, 332 F.3d at 1361 ("***A reasonable jury could have concluded from the evidence*** that Appellants knew that

transferring the Librarians on the basis of race was illegal, were warned not to make the transfers, and knew that other Fulton County officials had been caught and punished for making employment decisions on the basis of race * * *.") (emphasis added); *Romo*, 6 Cal. Rptr. 3d at 806 & n.8 (rejecting defendants' argument that *State Farm* requires a court "either to reevaluate the evidence or to accept only 'the core facts of the case that the jury *had to find* in order to return a punitive damage verdict against the defendant'" and concluding that "[s]ubstantial evidence supports the jury's implicit conclusion that Ford acted with malicious conduct under aggravated circumstances") (emphasis in original); *Diamond Woodworks*, 135 Cal. Rptr. 2d at 761 ("[W]e are compelled to observe that a jury did, in fact, determine Argonaut's conduct to be fraudulent and reprehensible and deserving of significant punitive damages. Neither the Constitution nor the *Campbell* court's interpretation of the due process clause requires us wholly to ignore the determination of the jury * * *."); *Waddill* v. *Anchor Hocking, Inc.*, 78 P.3d 570, 574 (Or. Ct. App. 2003) ("[D]efendant fails to recognize that the jury decided the case in plaintiff's favor and that, as a result, ***we must resolve all disputed facts in favor of plaintiff***.") (emphasis added).

2. This "hands-off appellate deference to juries" (*Exxon Valdez*, 270 F.3d at 1239) when determining the degree of reprehensibility of a defendant's conduct is impossible to square with this Court's precedents. In *BMW*, for example, an Alabama jury found that the defendant committed fraud and also found, by clear and convincing evidence, the prerequisite for imposition of punitive damages — that the fraud was "'gross, oppressive or malicious.'" *BMW*, 517 U.S. at 565 (quoting Ala. Code § 6-11-20). Notwithstanding that jury finding, the Court independently evaluated the degree of reprehensibility of the defendant's conduct, concluding that "none of the aggravating factors associated with particularly reprehensible conduct [was] present." *Id.* at 576. The Court emphasized that the jury's finding of the conduct necessary for

punitive liability was entirely irrelevant to the excessiveness analysis, stating:

> We accept, of course, the jury's finding that BMW suppressed a material fact which Alabama law obligated it to communicate to prospective purchasers of repainted cars in that State. * * * That conduct is sufficiently reprehensible to give rise to tort liability, and even a modest award of exemplary damages[, however,] does not establish the high degree of culpability that warrants a substantial punitive damages award.

*Id.* at 579-80. See also *id.* at 585 ("[W]e of course accept the Alabama courts' view that the state interests in protecting its citizens from deceptive trade practices justifies a sanction in addition to the recovery of compensatory damages. We cannot, however, accept the conclusion of the Alabama Supreme Court that BMW's conduct was sufficiently egregious to justify a punitive sanction that is tantamount to a severe criminal penalty.").

In *Cooper Industries*, the Court expressly held that appellate review of a trial court's application of the *BMW* guideposts is *de novo*. In the course of so holding, it indicated that reviewing courts must accept "***specific*** findings of fact" by the jury (532 U.S. at 439 n.12 (emphasis added)), thereby implying that, in the absence of such findings, reviewing courts must decide for themselves whether the aggravating factors characteristic of highly reprehensible conduct are present. And in *State Farm*, the Court reiterated the importance of "[e]xacting appellate review" (123 S. Ct. at 1520), giving no indication that this critical constitutional requirement can be satisfied by application of a sufficiency-of-the-evidence type standard.

3. To the contrary, in the absence of specific factual findings that can be reviewed deferentially, a sufficiency-of-the-evidence standard is inconsistent both with the law/fact

distinction the Court drew in *Cooper Industries* and with the procedural due process concerns it expressed in *State Farm*. That is because neither a jury's finding of the conduct necessary for punitive liability nor the amount of punitive damages the jury elects to impose supplies any indication of its assessment of the ***degree*** of reprehensibility of the defendant's conduct. Indeed, the jury's function in setting the amount of punitive damages does not typically involve determining whether any particular fact has been proven. Upon reaching the punishment-setting stage, the jury generally is not instructed that it must find particular facts and rarely is asked to return a special verdict answering specific factual questions bearing on the degree of reprehensibility of the defendant's conduct. Instead, juries typically are told little more than that they have discretion in setting the amount of punitive damages and that the purposes of punitive damages are to deter and punish.[8] In short, the jury essentially is asked to make an impressionistic judgment about the amount of punishment to exact. The resulting verdict is the legal equivalent of an ink blot, subject to any number of possible interpretations.

It follows that the standard for reviewing the amount of punitive damages should be substantially different from the standard that applies to sufficiency challenges to liability determinations. Because it is not possible to tell what facts (if

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[8] For example, the jury in this case was instructed:

> In awarding punitive damages in this case, you may award such sum as, in your judgment, would be reasonable and proper as punishment to the defendants for such wrongs that you have found, and as a wholesome warning to others not to offend in like manner.
>
> Punitive damages should be awarded with caution, and you should keep in mind that they are only for the purpose just mentioned, and are not for the measure of actual damages.

Tr. 2169.

any) the jury found in setting an amount of punitive damages or what relative weight it gave to any facts that may have been found, application of a sufficiency-of-the-evidence standard (as both reviewing courts did here) would result in deference being given to what are in reality phantom factual determinations, which in turn results in "false positive" determinations of high reprehensibility. This concern is more than hypothetical. In most cases in which a large punitive award is imposed against a wealthy company, the plaintiff's counsel argues both that the conduct was egregious and that the punitive damages must be significant in relation to the defendant's net worth (or some similar measure of wealth) in order to accomplish the deterrent function.[9] It is impossible to tell from the mere fact that the jury returned a multi-million dollar punitive verdict whether the jury actually accepted any of the inferences urged on it by the

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[9] This case is no exception. During closing arguments, plaintiffs' counsel told the jurors that "you have now seen what Price Development's wealth is [over $37 million] and how it is used and how it is operated" and then proceeded to ask rhetorically:

> What is the sum that will send this message to everybody, but particularly to Price Development Company? Is it $1 million or $2 million? I submit that that doesn't began to touch it. That may just simply, in their minds, it might justify what they have done, they can probably do it again. It has got to be something that is far beyond what the actual damages are that you have found yourself. A lesson and a message. $5 million? Possibly. $8 million to $10 million, probably?

Tr. 2171-72. In view of that exhortation, there is no basis for assuming that, in assessing a punitive award of $5.5 million (a figure right around the number suggested by counsel as "possibly" being sufficient to deter), the jury regarded Fairfax's conduct to be especially reprehensible, much less that it found Fairfax to have committed each of the acts of alleged misconduct relied upon by the Utah Supreme Court in concluding that "[Fairfax's] actions * * * support a substantial award of punitive damages" (App., *infra*, 19a-20a).

plaintiff's counsel or instead believed that, in view of the substantiality of the defendant's financial resources, a multimillion dollar award constituted modest punishment for conduct of modest reprehensibility.

4. The difference between deferring to a jury's finding of punitive liability and conducting a true *de novo* review of the degree of reprehensibility of the defendant's conduct is readily apparent in this case. Any court undertaking a searching review of the evidence would have to conclude that Fairfax's conduct did not come anywhere close to the level of reprehensibility necessary to support a $5.5 million punitive award (almost three times the amount this Court deemed in *BMW* to be "tantamount to a severe criminal penalty" (517 U.S. at 585)). The gist of the harm sustained by the Smiths is that they were not informed of the contribution agreements conveying the mall property to the REIT and of the resulting unavailability of the three options that Fairfax originally gave them regarding how their interests would be handled in a REIT transaction until several months after the fact.[10] Fairfax's failure to disclose this information, however, was the result of the advice of counsel, not intentional malice, trickery, or deceit.[11]

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[10] It is notable in this regard that the Utah Supreme Court observed that "[r]easonable minds could disagree as to whether the Smiths' interests in the mall had value outside of the REIT and therefore whether the Smiths were damaged by [Fairfax's] breach of contract, breach of fiduciary duty, and conversion." App., *infra*, 7a. Because both Utah courts applied the deferential sufficiency-of-the-evidence standard, neither attempted to resolve this disagreement when determining the degree of reprehensibility of Fairfax's tort.

[11] The Utah Supreme Court rejected Fairfax's reliance on advice of counsel on the ground that "substantial evidence was presented at trial that [Fairfax] did not want the Smiths to interfere with the REIT's formation by filing an adverse claim or a lawsuit prior to January 1994 when the REIT went public." App., *infra*, 20a. There

The other indicia of reprehensibility pointed to by the Utah Supreme Court also fail to hold up under the kind of exacting review dictated by this Court's precedents. The March 8, 1994 letter setting forth original and revised computations of the Smiths' interests in the REIT was far from "intentionally misleading" (App., *infra*, 19a); at worst it was a confusing account of REIT computations that did not injure the Smiths in any way, and in fact, offered them a significantly greater sum than the computation attached to the contribution agreements to which they claim entitlement. Moreover, contrary to the Utah Supreme Court's supposition (*ibid.*), there is no evidence that Fairfax intentionally withheld the accurate accounting until six years of litigation had passed; rather, the undisputed testimony is that this calculation was inadvertently omitted from the contribution agreements sent to Smith in April 1994. Finally, the alleged self-interest of Fairfax in entering into the REIT transaction (*id.* at 20a) is irrelevant to whether its conduct was reprehensible because it is undisputed that the REIT could have proceeded without the Mall, that the benefits of the REIT would have accrued to Fairfax and John Price regardless of whether the Mall was contributed, and that tax consequences were not a consideration in the REIT process. Tr. 1122-23, 1326-27, 1921-22, 1989.[12]

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is no evidence in the record to support the court's belief, and, in fact, the evidence compels the exact opposite conclusion. It is undisputed that, over one week prior to the REIT's closing, Fairfax overnighted to Smith a copy of the Prospectus that disclosed virtually all the facts that Fairfax was allegedly keeping secret from the Smiths. Tr. 298. Had the Utah Supreme Court employed "exacting" review, it could not have accepted at face value an assertion about Fairfax's intent that was belied by the evidence of what actually transpired.

[12] The Utah Supreme Court's citation of assorted examples of Fairfax's alleged financial misconduct completely unrelated to the REIT transaction, including payment of excessive fees to itself, commingling of funds, and selective accrual of interest on Fairfax's capital contributions (App., *infra*, 19a) does not stand up to exacting

In short, as this case well demonstrates, the difference between sufficiency-of-the-evidence review and exacting review can be the difference between upholding a multimillion dollar punishment and concluding that "a more modest punishment * * * could have satisfied the State's legitimate objectives" (*State Farm*, 123 S. Ct. at 1521). Because the Utah Supreme Court regrettably is not alone in diluting the constitutionally mandated exacting review by engaging in unwarranted deference to phantom factual findings, review is warranted to clarify that, in the absence of specific jury findings, reviewing courts must determine for themselves whether the evidence establishes the existence of aggravating factors indicative of high reprehensibility.

## CONCLUSION

The petition for certiorari should be granted.

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review either. First, the Smiths presented no evidence of the amount of any overcharge of management fees or other claim of injury. Moreover, neither Fairfax nor the Smiths were paid back their capital contributions, or interest thereon, and the accounting entry for interest on Fairfax's capital contribution was later reversed. Tr. 921, 923, 1684-85, 1772-73, 2002-03. Finally, Smith was aware as early as 1990 that Fairfax was combining the Partnerships' bank accounts with the accounts of other Fairfax properties, yet failed to raise an objection. Tr. 224-25, 418-19.

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